Filed 4/23/19 P. v. Knight CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LEON KNIGHT, JR., Defendant and Appellant.	2d Crim. No. B284886 (Super. Ct. No. BA444204) (Los Angeles County)

Leon Knight Jr. suffers from schizophrenia. He appeals from judgment after conviction by jury of making criminal threats against his neighbor with personal use of a deadly weapon (a pair of knives) and assaulting his neighbor with a deadly weapon (a glass ashtray). (Pen. Code, §§ 422, 12022, subd. (b)(1), 245, subd. (a)(1).)[1] Knight admitted he suffered two prior serious felony convictions. (§§ 1170.12 and 667, subds. (b)-(j).)

[1] All statutory references are to the Penal Code unless otherwise stated.

The trial court granted Knight partial relief from his strikes pursuant to *Romero*[2] and sentenced him to a total term of 14 years in prison, including two five-year enhancements for the prior serious felony convictions. (§ 667, subd. (a)).[3] At the time, pre-trial diversion for mental health treatment (§ 1001.36) was not available and the trial court had no authority to strike the five-year enhancements. (§ 667, subd. (a).)

We reject Knight's claim of instructional error and we reject his challenge to the sufficiency of the evidence. We conditionally reverse to allow the trial court to consider whether to grant pre-trial diversion for mental health treatment under recently enacted section 1001.36. If it does not grant diversion, or if Knight does not succeed in diversion, we direct the trial court to reinstate his convictions and to conduct a sentencing hearing at which it shall consider whether to strike one or more enhancements pursuant to the recent amendments to sections 667, subdivision (a) and 1385.

FACTUAL AND PROCEDURAL BACKGROUND

Knight and Herbert Russell lived in the same apartment complex. Russell kept two classic cars in the carport.

Russell testified that when Knight takes his medication, he is a "great guy" and a "nice person"; but when he does not, he is a "different person." Knight sometimes claimed Russell's cars were

---

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

[3] The court struck both strikes as to the criminal threats count and one strike as to the assault count. For the assault, it sentenced him to a low term of two years, doubled for the strike, plus two five-year enhancements for the prior serious felonies. For the threats, it imposed a concurrent three-year high term.

his. Knight occasionally removed their covers or otherwise interfered with them.

April 2015 Criminal Threats

One morning in April 2015, Knight removed the cover from one of Russell's cars and put it into his storage locker. Russell heard the car alarm and went to the carport. A butter knife belonging to Knight's household was wedged in the car's door frame.

When Russell saw Knight sitting nearby, Russell asked him if he had taken the cover. Knight became angry. He said, "Don't ask me something about my car," and "I tell you this: I'm going to get a gun." Russell called 911. He said, "I need a squad car here. This guy is trying to break in my car." "He said he's going to get his gun."

Knight went to his apartment and returned with two butcher knives, each about twelve inches long. He told Russell, "I'm going to kill you mother-fucker." Russell called 911 again. He said, "he's approaching me with knives." As the police arrived, Knight retreated into his apartment.

Police took Knight from the apartment in handcuffs and led him away. Russell asked the officers not to take Knight to jail. He asked them to give Knight mental health treatment.

February 2016 Assault

Very early on a February morning in 2016, Russell heard Knight fighting with the woman with whom Knight lived. She yelled, "Help, help." Knight came out of his apartment and hung underwear on a lamp near Russell's door. He walked toward the carport. Russell's car alarm sounded. Russell went to the carport and saw that his car's cover had been removed again. He saw Knight returning to his apartment. Knight was at the top of

a stairwell; Russell stood in the parking lot below. Russell told Knight to stop "messing with these cars."

Knight said, "get away from my mother-fucking cars before I kill you." Russell said he believed "that he would cause [him] bodily harm." He "believe[d] he would hurt me." Knight threw a glass ashtray "directly" at Russell. Russell jumped out of the way and the ashtray shattered in the parking lot. Russell called 911. He said, "He just threw an ashtray or something at me." Twenty minutes later, police had not responded and Russell called again. He said, "The gentleman is approaching me right now as we speak." About ten minutes later, Russell called again and said, "He's beating his wife right now, he's about to drag her down the stairs."

The woman who lived with Knight testified that Knight did not throw the ashtray down at Russell. She said Knight threw the ashtray inside their home, it shattered, and she swept it up and placed the pieces outside at the bottom of the stairs before the police came.

At the close of evidence, the prosecutor requested an instruction on attempted criminal threats. Defense counsel objected. The court refused the instruction.

In closing, the prosecution argued that Knight made criminal threats in April when he approached Russell with the butcher knives and said, "I'm going to kill you mother-fucker," that he made criminal threats again in February when he told Russell, "get away from my mother-fucking cars before I kill you," and he assaulted him with a deadly weapon when he threw the ashtray at him.

Defense counsel argued there was no evidence that Knight had knives, Knight never threatened to kill Russell, and the physical evidence did not support his claim that Knight threw an

ashtray at him. She argued that Russell lied about those things because he wanted Knight to stop bothering his cars and he could not get the police to respond unless he told them a person was in danger.

On the first day of deliberation, the jury announced that it was unable to reach a verdict except as to the February criminal threats count. The court instructed it to continue deliberating. It returned its verdict the following day. They acquitted Knight of the February criminal threats count and convicted him of the other two charges.

DISCUSSION

Diversion for Mental Health Treatment

While this appeal was pending, the Legislature enacted Penal Code section 1001.36, which created a pretrial diversion program for defendants with mental disorders including schizophrenia. (Pen. Code, § 1001.36.) If a trial court determines that a defendant meets its six requirements, and that recommended mental health treatment will meet his or her specialized mental health treatment needs, it may grant diversion and refer the defendant to an approved treatment program for up to two years. (*Ibid.*) If they succeed, the charges may be dismissed. (*Ibid.*) If their performance is unsatisfactory, criminal proceedings may be reinstated. (*Ibid.*)

The pretrial diversion program is ameliorative and applies retroactively to defendants whose judgments were not final at the time of its enactment. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 [conditional reversal for section 1001.36 diversion hearing], superseded in part by statutory amendment excluding murder from diversion § 1001.36, subd. (b)(2)(A); *In re Estrada* (1965) 63 Cal.2d 740, 744-745, 748; *see People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 304.) Knight's appeal was pending

when section 1001.36 was enacted and its provisions apply to him.

The Attorney General argues there is evidence to rebut the inference of retroactive applicability because the statute describes a program that operates pre-trial. (e.g. § 1001.36, subd. (c) ["'pretrial diversion' means postponement of prosecution . . . at any point . . . until adjudication"].) The *Frahs* court rejected these arguments, relying on *Lara*. (*Frahs*, *supra*, 27 Cal.App.5th at 791.) In *Lara*, the Supreme Court concluded that juvenile transfer hearings under Proposition 57 must be made available to defendants whose convictions are not yet final on appeal, although those transfer hearings are designed to occur before adjudication. (see *Lara*, *supra*, 4 Cal.5th at pp. 304, 312-313; *Frahs*, *supra*, at p. 791.)

The Legislature's stated purpose in enacting section 1001.36 supports broad application: it is intended, "to promote . . . increased diversion . . . to mitigate . . . reentry into the criminal justice system while protecting public safety." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, italics omitted; 1001.35, subd. (a).) It is in this respect like Proposition 57, which was intended to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141, § 2 (4); *Lara*, *supra*, 4 Cal.5th at p. 310.) Its stated purpose similarly "support[s] the conclusion that *Estrada's* inference of retroactivity is not rebutted." (*Id.* at p. 309.)

"[A]lthough [Knight's] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal. Thus, we will instruct the trial court -- as nearly as possible -- to retroactively apply the provisions of section 1001.36, as though

the statute existed at the time [Knight] was initially charged." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Discretion to Strike Serious Felony Enhancements (SB 1393)

We address Knight's remaining claims in the event he is not granted diversion or he does not succeed in the program.

SB 1393, adopted September 30, 2018, amends sections 667 and 1385 to grant trial courts discretion to strike prior convictions as they relate to five-year enhancements under section 667, subdivision (a)(1). (See Sen. Bill No. 1393 (2017-2018 Reg. Sess.) It applies retroactively to all cases with enhancements imposed under section 667, subdivision (a)(1), in which judgment was not yet final when it took effect on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The trial court did not clearly indicate that it would have imposed the enhancements even if it had the discretion not to do so, as the Attorney General concedes. (see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Evidence of Criminal Threats

Knight contends there is not sufficient evidence that he made criminal threats when he said, "I'm going to kill you mother fucker," with knives in his hands. He argues there was insufficient evidence that he directed a threat at Russell or that Russell was in sustained fear. He points to Russell's testimony that, "I don't know if he meant it," "he could have been talking to his wife," and "the officer there saw I wasn't too afraid." He argues the 911 calls demonstrate that Russell was more afraid of his cars being vandalized than of harm to himself, and if Knight really made criminal threats in April he would have been charged before the February incident occurred.

Russell did minimize some facts at trial. As he told the jury: "I don't want to say the wrong thing to cause this man a long time in prison because he needs mental help." But the record contains substantial evidence to support the conviction. (*People v. Edwards* (2013) 57 Cal.4th 658, 715 [substantial evidence review].)

The conviction for making criminal threats required proof that (1) Knight willfully threatened to commit a crime which would result in death or great bodily injury, (2) with the specific intent that it be taken as a threat, (3) the threat was so unequivocal, unconditional, immediate, and specific as to convey an immediate prospect of execution of the threat, (4) the threat actually caused Russell to be in sustained fear, and (5) Russell's fear was reasonable under the circumstances. (§ 422, subd. (a); *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) Knight points out that section 422 does not prohibit "mere angry utterances or ranting soliloquies, however violent." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.) It "was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others." (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.)

Knight did not merely have an outburst; he threatened to kill Russell after arming himself with two butcher knives. The threat was directed at Russell. After Knight said to Russell, "Don't ask me something about my car. . . I'm going to get a gun," he went to his apartment and returned with both knives held forward, "coming -- approaching down the stairs," saying "I'm going to kill you mother-fucker."

At trial, Russell said Knight "could have been talking to his wife," who was standing next to Knight. But she was not down the stairs; Russell was. And at the time, Russell told police he believed Knight was talking to him. At trial, he acknowledged

that was "the truth." He added, "But for the record, I don't wish this gentleman to go to prison. I know he has mental illness. I would like for him to be admitted to mental health."

A jury could find Russell was in reasonable and sustained fear. He testified he "fe[lt] threatened," when Knight said he was going to get a gun. He told the 911 operator that Knight "said he was going to get his gun, so I need a patrol car here." He said he did not believe Knight was going to get a gun, but he was "afraid of" Knight "because [he knew] he has a mental illness." Russell testified he was "more" afraid of Knight when he came out with the knives, "because he had weapons in his hands." He said, "when I seen the knives I got far away from him, period, in the middle of the parking lot." When Knight threatened to kill him, Russell "felt he would do it." He felt Knight was "capable of doing it," and "in fact, would try to harm [him]."

Russell testified, "I wasn't afraid. It was just the way I felt . . . ," but he was describing a moment after Knight had been handcuffed and was being led away by police. When he said, "the officer there saw I wasn't too afraid," he was also describing the aftermath. Russell testified that Knight went back into his apartment as soon as he heard the sirens. When counsel asked Russell to clarify whether he felt Knight "in fact, would try to harm you?" Russell answered, "Yes, Ma'am."

Instruction on Attempted Criminal Threats

Knight contends the court should have instructed the jury on the lesser included crime of attempted criminal threats, over his objection. We disagree. He invited any error, and any error was harmless.

Attempting to make a criminal threat is a lesser included offense of making a criminal threat. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609.) Trial courts have a sua sponte duty to

instruct on lesser included offenses that are supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) The duty arises if there is substantial evidence which, if accepted would absolve the defendant from guilt of the greater offense but not the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) The purpose is to prevent either party from forcing an all-or-nothing choice, and to encourage a verdict that is no harsher nor more lenient than the evidence merits. (*People v. Smith* (2013) 57 Cal.4th 232, 239-240.) We review de novo the trial court's decision not to instruct on the lesser included offense, viewing the evidence in the light most favorable to the defendant. (*Waidla* at p. 733.)

The obligation to instruct on lesser included offenses exists even when a defendant expressly objects. (*People v. Souza* (2012) 54 Cal.4th 90, 114.) But any error is waived if defense counsel intentionally invites it "express[ing] a deliberate tactical purpose in resisting . . . the complained-of instruction." (*People v. Valdez* (2004) 32 Cal.4th 73, 115 [no invited error where the record was ambiguous whether counsel rejected all, or only some, instructions on lesser included offenses].)

"If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 831 [invited error where the record demonstrated counsel believed it was in his client's interest not to have a second degree murder instruction].)

The record demonstrates that Knight's counsel made a deliberate, tactical choice not to have an attempted threat

instruction. She suggested that, without it, the chances of acquittal were greater. The record clearly demonstrates that the trial court gave her a choice: "The Court: . . . You're still opposing giving the instruction? . . . [Defense Counsel]: Yes, Your Honor. . . . The Court: Okay. I don't think it is warranted here really."

Even if the error were not invited and if a jury could have disbelieved Russell about fear while believing him about the threat, any error was harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.) The evidence was overwhelming that Knight was guilty of the greater offense. Russell testified that Knight approached him with butcher knives saying he would kill him. Russell testified consistently that he believed Knight was capable of executing the threat and he was afraid until the police came. Any reasonable person in his position would feel the same.

Evidence of Assault with a Deadly Weapon

Knight contends there is insufficient evidence to support a finding that he assaulted Russell with a deadly weapon because the size, shape, and weight of the ashtray were uncertain and he did not use it in a manner likely to produce death or great bodily injury. Substantial evidence supports the conviction.

For purposes of section 245, subdivision (a), a deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) "[F]or an object to qualify as a deadly weapon based on how it was used, the defendant must have used the object in a manner not only capable of producing but also likely to produce death or great bodily injury." (*In re B.M.* (2018) 6 Cal.5th 528, 530, italics omitted.) "'[T]he trier of fact may consider the nature of the object, the manner in which it

is used, and all other facts relevant to the issue.'" (*Id.* at p. 533.) We review the record for substantial evidence to support its determination. (*Ibid.*)

Russell testified that Knight threw the ashtray from a second floor landing, "exactly at me," "directly at me." Russell had to jump to avoid being hit, and the ashtray shattered on the pavement. In the 911 call, Russell described the object as "glass bottles" or "like an ashtray." At trial he described it as an ashtray. The woman who lived with Knight testified it was a "heavy," "thick solid glass" ashtray. The potential harm to Russell was more than slight, superficial, or moderate.

The ashtray was like the bottles that were thrown or used to hit people in *People v. Cordero* (1949) 92 Cal.App.2d 196, 199 and *People v. Martinez* (1977) 75 Cal.App.3d 859, 862 and like the metal showerhead that was thrown in *People v. White* (2015) 241 Cal.App.4th 881, 885. Each of these was sufficient to sustain convictions for assault with a deadly weapon or by means likely to produce great bodily injury.

Knight contends his intent was not clear; he could have been aiming at the cars. But Russell testified Knight threw the object directly at him. Assault with a deadly weapon is a general intent crime. Knight must only have intentionally engaged in conduct that would likely produce injurious consequences. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214-215.) The jury could infer he did so from Russell's testimony that he "was looking right at [Russell]," and "threw the object at [him]." The use of the described force is what counts, not the intent with which it is employed. (*Ibid.*)

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the superior court with directions to conduct a

diversion eligibility hearing pursuant to section 1001.36. If the trial court determines that Knight qualifies for diversion, the court may grant diversion. We express no opinion on that determination.

If the trial court grants diversion and Knight successfully completes diversion, then the trial court shall dismiss the charges. If however the court does not grant diversion, or Knight does not successfully complete diversion, then his convictions shall be reinstated.

If Knight's convictions are reinstated, the trial court shall resentence defendant, considering whether to exercise its discretion pursuant to sections 667(a) and 1385(b), as amended by Senate Bill 1393. We express no opinion with respect to that decision.

NOT TO BE PUBLISHED.

PERREN, J.

I concur:

GILBERT, P. J.

YEGAN, J., Dissenting:

I respectfully dissent from that portion of the judgment that remands the case for consideration of the newly enacted mental health diversion statute. (Pen. Code, § 1001.36.)[1] The original statute applied "across the board" to every crime that could be committed in California. It was amended to exclude eight specified crimes and other exclusions. This of course does mitigate the sweeping nature of the mental health diversion statute. But even with the amendment, the statute is poorly thought out and poorly drafted. One example is all that is necessary to see the problem. In theory, a person who uses a firearm and assaults the Governor, a Legislator, a Judge, or a peace officer, can be diverted so long as the victim is only wounded. This is beyond unwise. In my opinion, and as I shall explain, the statute is unconstitutional.[2]

Appointed and elected officials take an oath of office to support and defend, inter alia, the California Constitution. As Justice Mosk has said, the Goddess of Justice should not wear a black arm band and weep for the California Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 299 (dis. opn. of Mosk, J.) (*Brosnahan*).) If the people of the State of California want a mental health diversion statute, they may amend the constitution. But as I explain, the Legislature may not lawfully, by statute, amend the Constitution and abrogate other express constitutional provisions.

---

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] This is not raised as an issue on appeal. But a justice cannot, consistent with the oath of office, apply a statute which he or she believes violates the California Constitution.

The mental health diversion statute abrogates the constitutional rights given to crime victims in California Constitution Article I, section 28. It abrogates the people's constitutional right to a jury trial in Article I, section 16. It abrogates the people's constitutional rights to due process of law and a speedy and public trial in Article I, section 29. It abrogates or at least chills the Executive Branch of Government's constitutional right to grant immunity for crime.

An initiative approved by the electorate can be amended by the Legislature, but that process is subject to restriction. As noted in *Proposition 103 Enforcement Project v. Charles Quackenbush* (1998) 64 Cal.App.4th 1473. "Article II, section 10, subdivision (c) of the California Constitution prohibits the Legislature from amending an initiative measure unless the initiative measure itself authorizes legislative amendment. [Citations.]" (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1011.) The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to "'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' [Citations.]" (*Proposition 103 Enforcement Project v. Charles Quackenbush*, *supra*, at p. 1484.)

Prosecutor's Rights

The Legislature may not, by statute, abrogate constitutional rights guaranteed to the executive branch of government, i.e., the prosecutor. The statute runs roughshod over the separation-of-powers principle of our government. It chills the prosecutor's charging function. (See, e.g., *People v. Garcia* (1986) 183 Cal.App.3d 335, 344.) It takes little imagination to envision a prosecutor asking himself or herself whether he or she should even file charges which may culminate

in diversion. Parenthetically I note that it also chills present sanity provisions (§ 1368), "not guilty by reason of insanity" provisions (§ 1026), and mentally disordered offender provisions (§ 2960).

The statute, in effect, allows what is tantamount to a grant of immunity for serious and violent crime. This is astonishing. Traditionally, this is left to the prosecutor's sole discretion. Why? Because the grant of immunity by the prosecutor is part of the charging process afforded to the executive branch of government by the separation of powers principle. (See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 134; *In re Webber* (l974) 11 Cal.3d 703, 720; *People v. Andreotti* (2001) 91 Cal.App.4th 1263, 1268; *People v. Valli* (2010) 187 Cal.App.4th 786, 801.) This is now a judicial call. Just how the Legislature may curtail rights traditionally exercised by the Executive Branch of Government and transfer them to the Judicial branch of Government is not explained.

The statute erases the People's constitutional right to a jury trial. (Cal. Const., art. I § 16; see *People v. Whitmore* (1967) 251 Cal.App.2d 359, 364-365.) Also erased from the California Constitution is Article I, section 29: "'In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial.'" (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 892-893.) It is one thing for the Legislature to provide for diversion for a distinct class of class of crimes, e.g., diversion for non-violent drug offenses, but quite another thing to provide for diversion for almost the entire Penal Code. Indeed, it can fairly be said that the statute repeals, or at the very least, suspends the entirety of procedural criminal law.

Victim's Rights

Passed by initiative in l982, Proposition 8 added section 28 to the California Constitution. In relevant part, it provides: "The

rights of victims pervade the criminal justice system, encompassing not only the right to restitution from wrongdoers for financial losses suffered as a result of criminal acts, but also the most basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance." (See *Brosnahan*, *supra*, 32 Cal.3d at p. 242, italics omitted.) In my view, this is a list of rights afforded to the victims of crime which cannot be abrogated except by amendment to the constitution and not by simple statute. The victim of crime also has a constitutional right to be heard at sentencing. (Cal. Const., art. I, § 28, subd. (b)(8).) The net effect of the mental health diversion statute is that these constitutional provisions have now been erased.

The Instant Case

The very facts of this case illustrate that the statute, in theory, is beyond unwise. Appellant has mental problems, schizophrenia, that should be dealt with in the traditional way. He is no stranger to the criminal justice system and even on paper, he is dangerous. He has twenty-six entries on his "rap sheet." And, as indicated in the majority opinion, he is once again committing violent crime. The most recent probation report indicates as follows: "The defendant has a long prior criminal history spanning over 30 years. He has numerous felony and misdemeanor convictions including time served in prison. [¶] [¶] The defendant's actions were violent, serious and criminal. He poses an immediate threat to the community and should be held accountable for his actions. The defendant has previous grants of probation and parole, and has yet to be

deterred from his criminal behavior. Therefore, state prison is recommended."

Whether appellant can be rehabilitated short of criminal prosecution is not even debatable. Even if he is diverted and medicated in a locked facility for two years, he will be released. After conviction and sentence, remand for mental health diversion at this late date is beyond a "longshot." Appellant will not voluntarily take his medication. How do I know this? Not taking his medication was a factor in the commission of the instant offenses. I would not want to be the sentencing judge trying to explain to the next victim that the new mental health diversion experiment just did not work.

NOT FOR PUBLICATION.

YEGAN, J.

Craig E. Veals, Judge

Superior Court County of Los Angeles

Stanley Dale Radtke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jason Tran, Jonathan J. Kline, Kim Aarons and David D. Williams, Deputy Attorneys General, for Plaintiff and Respondent.